THE SCOPE AND PURPOSE OF SOCIOLOGICAL JURISPRUDENCE.[1]

[*Continued.*]

II.

5. The Social Utilitarians.[2]

A RADICAL change in jurisprudence began when the social utilitarians turned their attention from the nature of law to its purpose. On this account, the work of the leader of this group, Rudolf von Jhering (1818–1892), is quite as epoch-making as that of Savigny. A great Romanist, Jhering saw, none the less, the futility of the jurisprudence of conceptions which the historical school had built upon the classical Roman law, and stood for a jurisprudence of actualities.[3] Moreover, legislation was developing steadily in Germany as a living organ of the law, and this development was refuting a fundamental position of the orthodox historical jurisprudence. Not unnaturally, therefore, just as the Benthamian theory of law, which is really a theory of legislation,[4] is utilitarian, Jhering's philosophical standpoint was teleological.[5] Since life is governed by purpose, he held that the science of collective life must employ primarily a teleological method.[6] It is not enough, he

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[1] The first paper, 24 HARV. L. REV. 591 *et seq.*, treated of schools of jurists and methods of jurisprudence. This paper, continuing that discussion, takes up the social-philosophical jurists in their relation to sociological jurisprudence.

[2] Sternberg, Allgemeine Rechtslehre, I, 188–194; Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 84; Merkel, Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts, II, 733, 744 *et seq.* For critiques of their views, see Berolzheimer, Rechtsphilosophische Studien, 143 *et seq.*; Stammler, Wirthschaft und Recht, 578–584; Stammler, Lehre von dem richtigen Rechte, 191 *et seq.* See also Korkunov, General Theory of Law (Hastings' transl.), §§ 13–14.

[3] Scherz und Ernst in der Jurisprudenz, 1 ed. (1884), 9 ed. (1904).

[4] Maine, Early History of Institutions, Lect. XII and last paragraph of Lect. XIII.

[5] Der Zweck im Recht, Vol. I, 1 ed. (1877), 2 ed. (1884), 3 ed., posthumous (1893); Vol. II, 1 ed. (1883), 2 ed. (1886), 3 ed., posthumous (1898); 4 ed., both volumes (1905).

[6] *Cf.* Paulsen, Introduction to Philosophy (Thilly's transl.), xv, arguing that "ethics

conceived, for the jurist to know that law is a development; he must perceive not merely how it has developed, but for what purpose and to what end. He is not to draw the conclusion that legal doctrines and legal institutions are to be left to work themselves out blindly in their own way. They have not so worked themselves out in the past, but have been fashioned by human minds to meet human ends. For, he says, while we explain events of external nature by "because," human acts are explained by "in order to"; and this "in order to" in the case of the human will is as indispensable as the "because" in the case of a physical object. Hence the law of cause and effect as applied to the human will, that is, the psychological law of cause and effect, is a law of purpose.[7] Upon this basis he builds an utilitarian philosophy of law, challenging the then philosophical position at the outset. "The sense of right," he says, "has not produced law, but law the sense of right. Law knows but one source — the practical one of purpose." [8] In other words, whereas the philosophical jurist, adopting an idealistic interpretation of legal history, considered that principles of justice and right are discovered and expressed in rules, and the historical jurist taught that principles of action are found by experience and developed into rules, Jhering held that means of serving human ends are discovered and are fashioned consciously into laws.

All exposition of the doctrines and achievements of the social utilitarians must take account of Jhering's personality. It has been said of him that he was predestined to be a jurist, that "he was a jurist by the grace of God." [9] He saw the juristic possibilities of the most trivial events and transactions of every-day life.[10] He was born with a sense of right and justice which proved a complete compensation for want of practical training and enabled him on occasion to overcome not merely grave theoretical doubts but even the consensus of authority among civilians. In contrast with his great contemporary, Windscheid, it has been said that legal convictions were intuitions with the one, but the result of

and sociology, jurisprudence and politics, are about to give up the old formalistic treatment and to employ instead the teleological method."

[7] Der Zweck im Recht, 4 ed., I, 3–25.

[8] *Id.*, I, xiv.

[9] Eck, Zur Feier des Gedächtnisses von B. Windscheid und R. v. Jhering, 11 (1893).

[10] See his Law in Daily Life (transl. by Goudy).

regular theoretical deductions with the other.[11] In consequence, Jhering makes a great deal of the sense of right and justice that is in all of us,[12] and his view as to the administration of justice according to law calls for exercise by the magistrate of this sense of justice so as to advance the ends of law, and thus for a legal system that will afford due scope for such exercise. This is specially noticeable in his attack upon the "jurisprudence of conceptions" of the historical school.[13]

In the last half of the nineteenth century, the Romanist legal science of the historical jurists in Germany was coming to be out of touch with practical life. It was academic for the reason that much of our common-law legal science, *e. g.* assumption of risk, liberty of contract, right to follow a lawful calling, etc., is academic, — because derived by deduction from historical premises which had lost their value and hence much of their meaning for the society of today. To this academic legal science Jhering sought to oppose "a jurisprudence of realities" in which legal precepts should be worked out and should be tested by their results, by their practical application, and not solely by logical deduction from principles discovered by historical study of Roman and Germanic law. The details of the movement which he started belong to the history of law on the Continent of Europe. But the method by which he brought about a complete change of front marks an era in the modern science of law. Sternberg says:

"With the fundamental proposition that legal conceptions exist for men and not men, whose weal and woe is so largely conditioned by administration of law, for the conceptions, he placed jurisprudence upon the basis of a sound realism of which every separate science, and especially every practical science, has need. The science of law must never lose contact with the present. Its problem is to discover what justice and right require now. It must bring into systematic, scientific order, whereby alone law can fulfil its purpose in the present state of human development, the legal materials brought forth by the living consciousness of right. . . . If the scheme of legal conceptions does not express what the consciousness of right brings to the surface in practice, then the

[11] Eck, l. c., 11. Perhaps this is what Kohler refers to when he speaks of Jhering as "*ein ganz unphilosophischer Kopf.*" Lehrbuch der Rechtsphilosophie, 16.

[12] "The ethical self-assertion of the individual." Der Zweck im Recht, 4 ed., I, 47–61.

[13] As to this see Sternberg, Allgemeine Rechtslehre, I, 187–194; Brütt, Die Kunst der Rechtsanwendung, 87 *et seq.*

scheme of legal conceptions must be altered, for it is false or out of date. We are not to seek to force the living ideas of right into fetters for the sake of the system. Such a process simply leads back to a law of nature. . . ." [14]

Another consequence of Jhering's teleological method which has been of capital importance for jurisprudence is insistence upon the interests which the legal system secures rather than upon the rights by which it secures them. Law begins by granting actions. In time we generalize from these actions and perceive rights behind them. But, as the actions are means for vindicating rights, so the rights are means conferred by law for securing interests which it recognizes. The scheme of natural rights becomes a scheme of interests which the law ought to protect and secure so far as they may be protected and secured judicially, and hence something for the law-maker to take account of as of moral and political significance, rather than something for the judge to consider as of legal significance. Prior to Jhering the theory of law had been individualist. The purpose of law was held to be a harmonizing of individual wills in such a way as to leave to each the greatest possible scope for free action. Such was the view both of philosophical and of historical jurists.[15] Jhering's, on the other hand, is a social theory of law. The eighteenth century conceived of law as something which the individual invoked against society, an idea which is behind our American bills of rights. Jhering taught that it was something created by society through which the individual found a means of securing his interests, so far as society recognized them. Although much ingenious philosophical criticism has been directed against this theory,[16] it has not affected the central point. The conception of law as a securing of interests or a protecting of relations has all but universally superseded the individualist theory.[17]

[14] Allgemeine Rechtslehre, I, 190–191.

[15] See, for example, the definitions of Kant, Savigny, and Puchta. "The sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom." Kant, Metaphysische Anfangsgründe der Rechtslehre, 27. "The rules whereby the invisible boundaries are determined within which the existence and activity of each individual gains secure and free opportunity." Savigny, System des heutigen römischen Rechts, I, § 52. "The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects." Puchta, Cursus der Institutionen, I, § 6.

[16] See, for example, Korkunov, General Theory of Law (Hastings' transl.), 112–115.

[17] Kohler, Einführung in die Rechtswissenschaft, §§ 4, 6; Gareis, Science of Law (Kocourek's transl.) 30–35.

Still another consequence is to be seen in the theory of punishment as something to be adjusted not to the nature of the crime but to the nature of the criminal. This *Zweckstrafe*, as the Germans call it, must not be translated "utilitarian punishment." As Saleilles has said, such a statement of the theory ignores the movement inspired by Jhering and the importance he attributes to the idea of end as the "soul of every organic function" and so of the law also.[18] The contrast of *Zweckstrafe* to *Vergeltungstrafe* (the compensatory and retributive punishment of the classical school and of our penal codes) does not mean a utilitarian criminology. It means instead criminal law made a means to social ends; that punishment must be governed by its social end and must be fixed with reference to the future rather than to the past.[19] To quote Saleilles, it is a theory of "punishment characterized by its purpose as opposed to . . . punishment crystallized as a mechanical and mathematical retribution, without effect as to the past and without result as to the future."[20] The Italian anthropological and sociological criminalists contributed also to the complete change in theories of punishment which recent years have witnessed. But the social utilitarians connected it with and made it part of a general change of attitude throughout legal science.

Finally, a consequence of Jhering's juristic method is to be seen in the return to the imperative idea of law which has been so marked in recent literature. To one who thinks of society as recognizing interests and creating rights to secure them, law is very likely to be something made rather than found. We should expect him, therefore, to construct an analytical if not an imperative theory. Accordingly, though the rise of legislation in Germany under the Empire has no doubt contributed, the influence of Jhering's teleological method is to be seen in the prevalence in recent German thought of many of the characteristic and much-controverted doctrines of the English analytical school. Many ideas of which we think as distinctly Austinian have come to be commonplaces in the

[18] L'Individualisation de la peine, 2 ed., 11. Since the foregoing was written, an English translation has appeared in the Modern Criminology Series. The passage referred to may be found on p. 9.

[19] See Liszt, Der Zweckgedanke im Strafrecht, im Strafrechtliche Aufsätze und Vorträge, I, 126; Berolzheimer, System der Rechts und Wirthschaftsphilosophie, V, § 23; Saleilles, L'Individualisation de la peine, 2 ed., § 3.

[20] L'Individualisation de la peine, 2 ed., 11.

newer literature. Thus, it is held necessary to discuss whether public law is really law,[21] to argue whether and how far international law is law,[22] to point out that customary law obtains its authority from the state,[23] some even laying down Austin's doctrine of tacit command,[24] and to insist that whatever agencies may formulate legal rules, they obtain their legal character from the state.[25] This analytical bent is especially marked in the social utilitarians and in the works on general theory of law (*Allgemeine Rechtslehre*) in which the influence of Jhering has been stronger than in those upon the philosophy of law. In Austin's case there is an obvious connection between his theories and the legislative reform movement which was in progress before his eyes as he wrote. Similarly in Jhering's case the relation of his theories to the reform movement that led to the downfall of the Romanists of the historical school is sufficiently clear. Those who feel strongly the need of thorough-going reform are likely always to take an imperative position, since their hope lies in legislation. Usually it is only by procuring an authoritative expression of the will of the community that they may expect to establish their ideas in the legal system of the present.

Jhering was more a jurist than a philosopher. Moreover he wrote in the last half of the nineteenth century when philosophy was at its lowest ebb. Hence the philosophical side of his doctrine is coming to be the subject of much criticism. In part this criticism is directed equally to pragmatism as a philosophy of law, and will be considered in another place. But it must be conceded that Jhering ignores an important element in the development of law upon which those who stand for the idealistic interpretation insist rightly, even if too strongly. Legal history shows clearly enough that ideals of justice and of morals have been controlling

[21] Gumplowicz, Allgemeines Staatsrecht, 3 ed., 375–6 (1907).

[22] Liszt in Birkmeyer, Encyklopädie der Rechtswissenschaft, 1264 (1901); Heilborn in Holtzendorff, Encyklopädie der Rechtswissenschaft, 6 ed., II, 978 (1904); Kohler, Einführung in die Rechtswissenschaft, § 102 (1902); Grueber, Einführung in die Rechtswissenschaft, § 8 (1901).

[23] Bruns in Holtzendorff, Encyklopädie der Rechtswissenschaft, 6 ed., I, 303 (1904); Gareis, Science of Law (Kocourek's transl.), 79 (1905).

[24] Windscheid, Lehrbuch des Pandektenrechts, 9 ed., by Kipp, I, § 15, note 1; Czyhlarz, Institutionen, § 4.

[25] Gareis, Science of Law (Kocourek's transl.), 75 (1905); Jellinek, Das Recht des modernen Staates, 373 (1905).

factors in all periods of growth. In truth his theory, like that of the English analytical jurists, is a theory of law-making rather than of law. As Berolzheimer says:

"If all law has in view the welfare of society, then law abdicates in favor of administration; the idea of political expediency displaces the idea of right. Under the domination of the theory of purpose we have indeed rules of law (*Gesetze*) but no law." [26]

The social utilitarian may answer that the modern tendency is strongly toward administration for the very reason that it promotes the social ends which at present are matters of urgent concern. But such a tendency is not without precedent. It was very marked in English law in the sixteenth and seventeenth centuries, for much the same reason. The balance between law and administration inclines now one way, now the other, as does the balance between hard and fast rule and wide discretion in the administration of justice. But an attempt to identify the judicial with the administrative by an administrative theory of law will prove quite as futile as has been our common-law attempt to identify them by a purely judicial theory of administration.

On the other hand, Jhering's work is of enduring value for sociological jurisprudence. The older juristic theory of law as an end to individual liberty and of laws as limitations upon individual wills, divorced the jurist from the actual life of today. The jurists of whom Jhering made fun, translated to a heaven of juristic conceptions and seated before a machine which brought out of each conception its nine hundred and ninety-nine thousand nine hundred and ninety-nine [27] logical results, have their counterpart in American judges who insist upon a legal theory of equality of rights and liberty of contract in the face of notorious social and economic facts.[28] On the other hand, the conception of law as a means toward social ends, the doctrine that law exists to secure interests, social, public and private, requires the jurist to keep in touch with

[26] Rechtsphilosophische Studien, 143.

[27] Scherz und Ernst in der Jurisprudenz, 247, 257.

[28] See particularly Adair *v.* United States, 208 U. S. 161, 175, 28 Sup. Ct. 277, 286 (1908); Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539 (1905); People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1, 16, 59 N. E. 716, 721 (1901); State *v.* Haun, 61 Kan. 146, 162, 59 Pac. 340, 346 (1899); State *v.* Loomis, 115 Mo. 307, 315, 22 S. W. 350, 351, 352 (1893); Frorer *v.* People, 141 Ill. 171, 31 N. E. 395 (1892); Mathews *v.* People, 202 Ill. 389, 67 N. E. 28 (1903).

life. Wholly abstract considerations do not suffice to justify legal rules under such a theory. The function of legal history comes to be one of illustrating how rules and principles have met concrete situations in the past and of enabling us to judge how we may deal with such situations in the present, rather than one of furnishing self-sufficient premises from which rules are to be obtained by rigid deduction.

6. The Neo-Kantians.[29]

In the Neo-Kantians we see a return to the philosophical method. In England, the reaction from the eighteenth-century law of nature produced first an analytical school and later, partly as a revolt therefrom, a historical school, while the philosophical school came wholly to an end.[30] In Germany, a metaphysical jurisprudence supplanted natural law; but it was unfruitful, and the historical school all but displaced philosophical jurisprudence. Hence the recent German jurists represent different phases of a reaction from the historical school. This reaction brought forth first the analytically-inclined social utilitarians and then the philosophically-inclined Neo-Kantians. The sound kernel of the historical doctrine was preserved and developed by the Neo-Hegelians. It is noteworthy that the breakdown of philosophical jurisprudence in both countries coincides with the rise of a body of enacted law in which many traditional rules and doctrines were rejected summarily or made over from end to end. A tendency to dry-rot in juristic theory in periods of enactment and codification is to be observed throughout legal history. As has been seen, the analytical method, unless employed with caution, fosters this condition, because of the imperative conception of law which it involves. In the past also, though with less reason, the historical method has been by no

[29] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 48, iii; Brütt, Die Kunst der Rechtsanwendung, §§ 6–8; Kantorowicz, Zur Lehre vom richtigen Recht.

[30] After the introduction to Blackstone's Commentaries and Wooddesson's Elements of Jurisprudence, there is no attempt at philosophical jurisprudence in England except the second, third, and fourth lectures of Austin, which, as Maine pointed out long ago (Early History of Institutions, Lect. XII), have no real connection with his system. The Principles of Political Obligation of T. H. Green (lectures delivered 1879–1880, published 1886) and Herbert Spencer's Justice (1891) cover but a small part of the field and are to be classed with political rather than juristic philosophy.

means unfavorable to such a condition, since historical jurists have imposed limitations upon themselves, which to greater or less extent have neutralized the liberalizing effects which might else have followed from their doctrines. In Germany, these limitations were twofold: (1) the acceptance of a metaphysical method of deducing a whole system from an assumed fundamental idea, which, when applied in jurisprudence, led to a method of rigorous deduction from principles discovered through historical investigation, and (2) submission to a learned tradition which confined historical study to the texts of the Roman law.[31] In England, a like limitation was involved in the concession that historical jurisprudence was but complementary to the analytical method.[32] In America, distrust of legislation bred by our system of judicial tradition brought about a ready acceptance of Savigny's doctrines, with their incidental limitations, and a learned tradition arose which confined the jurist to the classical common law. Thus it was accepted that all the principles of a legal system sufficient for today were at least implicit in the English case-law of the sixteenth century, if not in the Year Books. The philosophical method has always been the means of escape from such conditions, and a return thereto in the twentieth century was to be expected. It was the task of the Neo-Kantians to remake philosophical jurisprudence and thus to aid in restoring the juristic ideals of reason and justice which, under the influence of analytical and historical methods, the world had seemed fated to lose or to forget.

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[31] On this see Kantorowicz, Zur Lehre vom richtigen Recht, 8. He finds five reasons for the self-imposed limitations of the German historical school, namely, (1) "a romantic disposition which found a contemplative immersion in history more attractive than actual taking part in the battles of the day," (2) that it succeeded the hasty and somewhat crude codifications of the sanguine, action-loving era of the French Revolution, (3) that the period in which it arose was one of political inactivity or even reaction, (4) acceptance of a "complaisant metaphysic which asserted it had found 'the reasonable' already worked out," and (5) the learned tradition which confined study to the Pandects.

Saleilles says: "In its application to the social sciences, history ought to become a creative force. The historical school had stopped half way." L'école historique et droit naturel, Revue trimestrielle de droit civil, 80, 95.

Our historical jurists of the last third of the nineteenth century present a remarkable parallel.

[32] See Morley's critique of Maine's Popular Government, Studies in Literature, 103, 118, 149. Much of this reminds one strikingly of what Germans are now saying of their own historical jurists.

Jurists of the eighteenth-century law-of-nature school went much too far in assuming that legal systems which were the result of a long historical development might be reconstructed *in toto* at pleasure in accord with abstract principles of right.[33] As happens frequently in a reaction, the historical school went too far in the opposite direction and attempted to exclude development and improvement of the law from the field of conscious human effort. History itself, however, presently began to refute them. The last quarter of the nineteenth century saw a new series of legislative projects of the first importance, a new literature upon the principles of legislation grew up, and the old historical materials, by this time thoroughly worked over, came to have but secondary value. Moreover the demand of modern society for fuller powers and wider discretion in the magistrate, to enable him to do justice in the great variety of controversies which grow out of a complex industrial organization, led the framers of the new legislation to leave wide margins for application of law at many points by provisions as to "good faith," "equity," the "dictates of good morals," weighing of the "circumstances of the case in hand," and the like. Thus a practical need of a new method arose, since without some method it was felt that the logical exactness of the old system would be superseded by mere guessing. Historical jurisprudence had nothing to offer for this situation and the metaphysical jurisprudence of the first half of the century was dead. The way was open for a new philosophical jurisprudence, and under the influence of the general philosophical awakening of the last decade of the nineteenth century, the opportunity was seized by Rudolf Stammler.[34] Avoiding, as one of his critics has said,[35] the Utopian rashness of the old natural law and the uncritical phlegm of historical jurisprudence, he sought a middle path; he sought a method of determining not

[33] But this criticism presupposes a considerable development of the legal system. Such cases as the reception of Roman law in Germany, the Anglo-Indian codes and spread of English law over India, the *verbatim* adoption of French codes in so many countries whose prior law was not in the least French, and the new codes of Japan, show that more may be said for the law-of-nature school upon this point than we have been wont to concede.

[34] Wirthschaft und Recht (1896), 2 ed. (1905); Die Gesetzmässigkeit in Rechtsordnung und Volkswirthschaft (1902); Lehre von dem richtigen Rechte (1902); Wesen des Rechts und der Rechtswissenschaft (in Die Kultur der Gegenwart, 1906). See also Sturm, Die psychologische Grundlage des Rechts (1910).

[35] Kantorowicz, Zur Lehre vom richtigen Recht, 9.

the absolutely and eternally just but the just relatively and for the time being; he sought to give us a "natural law with growing content" and thus to make available for a new period of growth an idea which had been perennially fruitful in legal history.

Stammler's doctrines, so far as we are concerned with them here, are developed in his "*Lehre von dem richtigen Rechte*," a title which we might well translate "Theory of Justice through Law," because of the contrast it suggests with the familiar "justice according to law." In this work he says:

"Natural law was to be a law whose content expressed the nature of man; justice through law calls for a law which expresses the nature of law." [36] "All schemes of natural law," he adds, "have undertaken, each in its own way, to furnish a project of an ideal code with an unchangeable, unconditionally valid legal content. Instead, it is my purpose to discover a formal method of general validity by which one may treat the material afforded by principles of law, which must necessarily grow and are conditioned empirically, and may criticize and determine this material so that it shall have the character of being objectively just." [37]

He distinguishes two modes of treating a legal rule. One takes up the content of the rule as it happens to be framed in the special case and deals with it as though it were an end. The other

"seeks to comprehend each rule in question in its character of a means; therefore it asks as to the practical value of the means when applied and undertakes to criticize the content of legal standards." [38]

The problem which we have to meet is to

"determine under what conditions the character of being just in its applications is present in a particular legal standard"; [39]

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[36] Lehre von dem richtigen Rechte, 95.

[37] *Id.* 116.

[38] *Id.* 13. In an able and instructive critique of Kocourek's translation of Gareis' Juristische Enzyklopädie, Judge Hastings objects to translation of "*Norm*" by "standard" (6 Ill. L. Rev. 208). This objection proceeds upon our common-law view of legislation as establishing a *rule*, whereas principles are to be found only in adjudicated cases. But the civilian thinks of legislation as affording principles, from which he may on occasion reason by analogy as we do from decisions. It does not furnish merely rules of action, it provides as well standards of decision. In recent German writing, the latter is insisted upon particularly.

[39] Lehre von dem richtigen Rechte, 27.

we must discover whither to appeal in order to reach a well-grounded decision as to the presence or absence of this quality of being just.[40] Accordingly he is led to discuss the relation of justice through law to the theory of morals, to natural law (reason), to mercy, and to the idea of right. At first sight this appears to be well-trodden ground. But his new statement of the problem has given a new value to this time-worn subject. Heretofore we have discussed the relation of law, of the body of abstract rules, to morals and ethics. Now our attention is turned instead to the relation of these matters to the administration of justice by rules. The question for the jurist, he says, becomes twofold; on the one hand, the existence of a rule of right and law, on the other, the mode of carrying it out.[41] This change of front in philosophical jurisprudence is of much more importance than the particular theories which any jurist may develop with respect thereto.[42]

Another noteworthy contribution of Stammler is to be seen in his theory of the social ideal as the criterion of justice through law. Heretofore we have had individualistic criteria. Jurists sought to deduce a system of just rules from freedom or equality or happiness as fundamental conceptions. A change began, indeed, with those utilitarians who saw in justice that which makes for the welfare of all applied as a standard for the conduct of each. Stammler, however, connecting his doctrine with that of Kant at this point, looks not to the individual free will but to the community of free-willing men. In this community, he holds, we are to bring about a harmony of individual ends so that all possible ends of those who are legally bound will be comprehended.[43] The contrast with Kant's theory, on which he builds, is significant. The problem which confronted Kant and those who followed him more immediately was the relation of law to liberty. On the one hand we live in an age of legislation, in which there is and must be external constraint and coercion, in which a philosophy that speaks only of reason and ideal justice is not a philosophy of the law that is. On the other hand we live in

[40] *Id.* 44.

[41] *Id.* 207.

[42] Kantorowicz says justly that Stammler's endeavor to find a method of "determining and directing the application of legal rules so that they shall have the quality of being objectively just" (Lehre von dem richtigen Rechte, 116) would suffice to mark an epoch in the history of the philosophy of law "even if he had met with no success at all." Zur Lehre vom richtigen Recht, 10.

[43] Lehre von dem richtigen Rechte, 196–200.

a democratic age in which the arbitrary and authoritative must have some solid basis other than mere authority and in which the individual demands the widest possible freedom of action. How were these two ideas, external restraint and individual freedom of action, to be reconciled? This question furnishes the clue to all philosophical discussion of the basis of law in the nineteenth century. Kant met it by formulating what has come to be known as "legal justice" — the notion of an equal chance to all exactly as they are, with no artificial or extrinsic handicaps. He looked on restraint as a means and freedom as an end, so that there should be complete freedom of action except so far as restraint was needed to secure the harmonious coexistence of the individual with his fellows according to a universal rule.[44] For this completely individualist theory in which the individual will is the central point, Stammler substitutes a social theory of justice in which individual ends are to be regarded, rather than individual wills, except as assertion of the individual will is an individual end. The relation of this to what is commonly called "social justice" will be perceived at once.[45] Its relation to Kant consists in bearing in mind that our community is one of free-willing men and in insisting that the individual wills of these men are not to be overridden arbitrarily. Accordingly, he lays down four fundamental principles of administration of justice through law which may be paraphrased thus:

1. One will must not be subject to the arbitrary will of another.

2. Every legal demand can exist only in the sense that the person obliged can also exist as a fellow creature.

3. No one is to be excluded from the common interest arbitrarily.

4. Every power of control conferred by law can be justified only in the sense that the individual subject thereto can yet exist as a fellow creature.[46]

Stammler warns us expressly that the foregoing principles are not at all like the supposed rules of natural law. They are not premises from which to deduce a whole code. They are rather

[44] Metaphysische Anfangsgründe der Rechtslehre, 27.

[45] *Cf.* Ward, Applied Sociology, 22–24.

[46] Lehre von dem richtigen Rechte, 208–211. Principles 2 and 4 will suggest at once the social legislation discussed by Professor Gray, Restraints on Alienation, 2 ed., viii–xi, and will indicate how such legislation may be directed intelligently to true social ends. See my paper, "The Need of a Sociological Jurisprudence," 19 Green Bag 607, 612–615.

guides intended to make possible an effective administration of justice through law. Hence they are not merely principles of politics and legislation; even more they lie at the foundation of the art of applying legal rules, and we must adapt them in such way that the actual material of a legal system will give effect to them. This process he calls "subsumption of questions of law under the social ideal and its fundamental principles,"[47] and he illustrates it by going over the whole field of the law in order to show that the historical content of our legal systems may be so applied to concrete questions with results both just and objectively valid.[48] Thus he gives us nothing less than a legal theory of social justice.

The value of Stammler's work for the whole science of jurisprudence is now recognized universally. Brütt says:

"He has a place in the philosophy of law comparable to that of Kant in the theory of knowledge. . . . As all prior metaphysic is overthrown by Kant, so all dogmatic theories of method stand after Stammler's theory of justice through law as tried and discarded. In the future all philosophy of law must orient itself with respect to Stammler as the theory of knowledge has had to orient itself with respect to Kant." [49]

Berolzheimer, a Neo-Hegelian and hence a critic of Stammler, says justly:

"Stammler's investigations are of the greater importance in the philosophy of law because in his *Lehre von dem richtigen Rechte* he was the first to set forth in a modern formulation the fundamental problem of natural law, the problem of discovering just law, the problem of the criteria of the idea of right."

"As results we have philosophical bases for a series of questions of the general theory of law and of economics, for which we owe him thanks. At the same time he makes a good disposition of certain ideas of the older philosophy of law and of law-making (particularly Roman private law and the German Civil Code) in that he identifies as applications of justice through law much that the Romans held an expression of *æquitas* or of *naturalis ratio*, which the German Civil Code speaks of as equity or equitable discretion or performance in good faith, etc. — to put the matter in one phrase, *law, congruent with the idea of right.*" [50]

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[47] Lehre von dem richtigen Rechte, 277. [48] *Id.* Bk. III.

[49] Die Kunst der Rechtsanwendung, 118.

[50] System der Rechts und Wirthschaftsphilosophie, II, 438–439.

For sociological jurisprudence, the importance of Stammler's work is threefold:

(1) Like Jhering, he gives us faith in the "efficacy of effort" as Ward happily puts it,[51] and furnishes a philosophical foundation for the conscious endeavor to promote social justice in which the sociologists rightly demand that the science of law as well as the science of legislation coöperate.

(2) He puts a social philosophy of law in place of the individualist philosophy theretofore dominant and formulates a legal theory of social justice.

(3) He adds a theory of just decision of causes to the theory of making of just rules and thus raises the important problem of the application of legal rules, of which there will be much to say in another connection. Suffice it to say here that this has become a burning question in recent juristic literature.

7. The Neo-Hegelians.[52]

The downfall of the German historical school did not involve the historical method, although in consequence the method suffered a temporary eclipse. The causes of the reaction from that school for the most part are quite outside of a true historical method. Rightly used, that method is as capable of bringing law into accord with life as any other, for it deals with the law as a body of experience in the administration of justice, and so affords our only sure criteria of what will be effective practically and what not, of what will do justice and what will fall short thereof.[53] Nothing can be found to

[51] Applied Sociology, ch. II.

[52] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 48, iv; Berolzheimer, Für den Neuhegelianismus, Archiv für Rechts und Wirthschaftsphilosophie, III, 193; Berolzheimer, Zum Methodenstreit in der Rechtsphilosophie der Gegenwart, Archiv für Rechts und Wirthschaftsphilosophie, III, 524; Castillejo, Kohlers Philosophie und Rechtslehre, Archiv für Rechts und Wirthschaftsphilosophie, IV, 56.

[53] "It is needful to distinguish nicely between the historical school and the historical method. The school of Savigny, taken in its first form, rested upon certain postulates which, under pretext of evolution, could only end in immobilization. The historical method is the method *par excellence*. Disengaged from every subjective element, it holds to facts and to realities, it classifies them and deduces from them the general laws which they permit. Applied to the law, it has no other purpose than to put law in conformity with life." Saleilles, Le Code Civil et la methode historique, Livre du centennaire du Code Civil, I, 97, 99. "That the principles of the historical school

take the place of a thorough understanding of the history of rules and doctrines, whether as a foundation for legislation with respect to them or as a means of interpreting and applying them when made over to fit the legislative mold. Nor can there be an assured method of applying to concrete cases rules expressed in any form unless the method takes account of the relation of the rules to the judicial and juristic experience of the past and seeks to adjust them to the present in the light thereof. If modern jurisprudence were to lose the historical method it would prove even more sterile than the much-abused historical jurisprudence of the last century. Moreover the comparative-historical method, which is a direct outgrowth through attempts to broaden the foundation of the historical school, is indispensable in any thorough-going critique of philosophical, as distinguished from metaphysical, theories. Hence the Neo-Hegelians have performed a service of the first magnitude in preserving and developing the historical method. They have sought to find the proper place for that method in systematic study of law and to relate it properly to the philosophy of law, to anthropology and ethnology and to economics. Thus they may claim, not without reason, to be the heirs of what is best in the philosophical and historical schools of nineteenth-century Germany.

The leader of this school, Josef Kohler,[54] without question the first of living jurists, is remarkable for the breadth as well as for the depth of his legal scholarship. A pioneer in comparative legal history,[55] he has made himself an authority not merely upon the general subject but upon more than one special branch [56] and upon the legal history of more than one primitive people.[57] At the same time he has made himself an authority upon such specialized subjects of dogmatic law as the law of bankruptcy and patent law,[58] has

can be totally refuted, is beyond my comprehension. If laws are to be explained, their development must be studied." Leonhard, The Historical School of Law, 7 Col. L. Rev. 573, 577.

[54] Of his numerous works, those which bear immediately upon the matter in hand are: Einführung in die Rechtswissenschaft (1902), 2 ed. (1905); Rechtsphilosophie und Universalrechtsgeschichte, in Holtzendorff, Encyklopädie der Rechtswissenschaft, 6 ed., Vol. I (1904); Moderne Rechtsprobleme (1907); Lehrbuch der Rechtsphilosophie (1909).

[55] Shakespeare vor dem Forum der Jurisprudenz (1883).

[56] Zur Urgeschichte der Ehe (1897); Recht, Glaube und Sitte (1892).

[57] Rechtsvergleichende Studien über islamitische Recht, das Recht der Berbern, das chinesische Recht und das Recht auf Ceylon (1889).

[58] Lehrbuch des Konkursrechts (1891); Leitfaden des deutschen Konkursrechts

made important contributions to modern criminalistic,[59] has written a text-book of the German civil code,[60] and has taken the lead in the most active and most widely accepted movement in the modern philosophy of law. No one else has come so near to taking all legal knowledge for his province. No one, therefore, is so well prepared to reduce all legal knowledge to a system.

Three points in Kohler's doctrine are of importance for our purpose: his theory of law as a product of the culture of a people, his theory of the relation of comparative legal history and the philosophy of law, and his method of interpretation and application of legal rules.

Declaring that Stammler's Neo-Kantian philosophy of law is unhistorical,[61] Kohler takes for his starting-point a *dictum* of Hegel that law is a phenomenon of culture. But he does not use this proposition as something from which to bring forth an entire system by purely deductive processes. He seeks instead to proceed empirically upon the basis afforded by ethnology, comparative law, and comparative legal history. Savigny held that law was a product of the genius of a people and was no more a result of conscious human will than is language. Kohler, on the other hand, holds that it is a product of the culture of a people in the past and of the attempt to adjust it to the culture of the present. He does not exclude conscious effort to make this adjustment.[62] On the contrary, he holds that the "jural postulates" of the culture of a people for the time being are to be discovered and that law is to be brought into accord therewith.[63] Yet he recognizes, as the legal historian must, the limitations upon "the efficacy of effort" in that we have to shape the material that has come down to us so that it meet the requirements of present culture, "so that it further culture and

(1893), 2 ed. (1903); Handbuch des Deutschen Patentrechts (1900); Forschungen aus dem Patentrecht (1888).

[59] Studien aus dem Strafrecht (1890–1897).

[60] Lehrbuch des bürgerlichen Rechts (1906).

[61] Lehrbuch der Rechtsphilosophie, 16.

[62] "The principle of relativity of law held by the historical school, which we also insist upon over and over again in comparative jurisprudence, has been thoroughly misunderstood. Since law is relative and is influenced by interests of culture, it has been supposed that law was wholly destitute of fundamental ideas. All distinction between the law that ought to be and the law that is was given up and the fantastic result was reached that the law which exists is the one that ought to be and that one law is as just as another." Moderne Rechtsprobleme, § 1.

[63] Lehrbuch der Rechtsphilosophie, 2.

does not check and repress it." [64] Moreover, this adjustment has to be made with respect to a constantly progressing culture. Hence law cannot stand still.

"This law cannot remain the same. It must accommodate itself to the progressing culture of the time and must be so fashioned as to express the growing demands of culture." [65]

What does Kohler mean by *Kultur*? His own definition is this:

"Culture is the development of the powers residing in man to a form expressing the destiny of man." [66]

Perhaps Professor Small has done most to make the idea plain to the reader of English. He says:

"What, then, is 'culture' (*Kultur*) in the German sense? To be sure the Germans themselves are not wholly consistent in their use of the term, but it has a technical sense which it is necessary to define. In the first place 'culture' is a condition or achievement possessed by *society*. It is not individual. Our phrase 'a cultured person' does not employ the term in the German sense. . . . At all events, whatever names we adopt, there is such a social possession, different from the individual state, which consists of adaptation in thought and action to the conditions of life. Again, the Germans distinguish between 'culture' and 'civilization.' Thus 'civilization is the ennobling, the increased control of the elementary *human* impulses by society. Culture, on the other hand, is the control of *nature* by science and art.' That is, civilization is one side of what we call politics; culture is our whole body of technical equipment, in the way of knowledge, process and skill for subduing and employing natural resources, and it does not necessarily imply a high degree of socialization." [67]

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[64] *Ibid.*

[65] *Ibid.*

[66] Moderne Rechtsprobleme, § 1.

[67] General Sociology, 58–60. See also pp. 344–346. Berolzheimer, explaining the term as used in the Neo-Hegelian philosophy of law, says : "Lexis defines the conception of culture thus (Das Wesen der Kultur, I, 1, 1906): 'culture is the raising of men above natural surroundings through the development and manifestation of their spiritual and moral powers.' Of course what Lexis refers to is not culture as a condition but culture as a source of development. Culture as a condition or result signifies that stage of human development in which groups of men are united in law and state, in a cult or metaphysic (as something always transmitted) and finally through exchange of ideas and art." Archiv für Rechts und Wirthschaftsphilosophie, III, 195–196.

Thus Kohler's doctrine calls for an understanding of the social history of a people and of its relation to law, whereas in the past we have looked to political history and the relation thereof to legal systems. Moreover, he conceives that legal history affords generalizations which are fundamental for the philosophy of law. By comparative study, we are able to construct a universal legal history which has for its task to show

"how the law has developed in the course of history, and in connection with the history of culture, to show what results in the culture of a people have been bound up in law, how the culture of a people has been conditioned by law and how law has furthered the progress of culture." [68]

In this way history is to be used to enforce the lesson that law must grow and to point the goal and indicate the means of growth, instead of being used to show the futility of conscious change as in the nineteenth century.

But Kohler's most important contribution is his theory of sociological interpretation and application of law. This deserves to be set forth in his own words:

"Thus far we have overlooked most unfortunately the sociological significance of law-making. While we had come to the conviction that it was not the individual who made history but the totality of peoples, in law-making we recognized as the efficient agency only the person of the law-maker. We overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings were fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become." [69]

[68] Rechtsphilosophie und Universalrechtsgeschichte, § 8.

[69] Lehrbuch des bürgerlichen Rechts, I, § 38.

8. The Revival of Natural Law in France.[70]

In France also the influence of Savigny established the tenets of the historical school, and the philosophical method, while not abandoned entirely, as is demonstrated by a continuous succession of treatises extending through the whole course of the nineteenth century,[71] for a season commanded little attention.[72] But the dominance of the historical school was much less complete than in Germany. France had a code, and that code remained the model for new codes in every part of the world until the new German code went into effect in 1900. Hence historical jurisprudence in France had merely the easy task of overthrowing the eighteenth-century law of nature. No other object of attack was at hand. It helped push "juridical idealism" into the background for a time. But the active force was rather the positivists and the older type of sociologists, who became the leaders of French juristic thought in the latter part of the nineteenth century. Presently the movement to bring the law into accord with life which began with Jhering, the vigorous development of the social sciences in France, and a resulting agitation for greater flexibility in the application of legal rules,[73] here as elsewhere brought about a new development of philosophical jurisprudence. In France, however, for the reasons suggested above, the movement represents a reaction not only from the historical school but from the positivists and the older type of sociologists as well.

Charmont puts the beginning of the movement as far back as 1891, the date of Beudant's *Droit individuel et l'état*.[74] But it is hard to see a forerunner in that vigorous and well written assertion of the individualist view as to the state. Written in a period which called for political idealism, its main purpose was to vindicate the

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[70] Charmont, La renaissance du droit naturel (1910); Demogue, Les notions fondamentales du droit privé, 21 *et seq.* (1911).

[71] See some account of these and of the decadence of philosophy of law in nineteenth-century France in the preface to Boistel, Cours de philosophie du droit, I, iii–xiv.

[72] See the apologetic prefaces to Courcelle Seneuil, Préparation à l'étude du droit (1887); Beaussire, Les principes du droit (1888); Vareilles-Sommières, Les principes fondamentaux du droit (1889).

[73] The leader of this movement, which has had a very important bearing upon recent juristic thought on the Continent, was Gény, Méthode d'interpretation (1899).

[74] La renaissance du droit naturel, 128.

individual as against the state, which it sought to do by going back to the declaration of the rights of man, reasserting the political theory of natural law, and founding law upon reason. This return to natural law in its eighteenth-century form was quite another thing than the revival of the idealistic interpretation which is the enduring possession of philosophical jurisprudence. The decisive impetus seems to have come from Stammler, whose *Wirthschaft und Recht* was made the subject of comment by Saleilles in 1902.[75] Stammler's striking phrase "natural law with changing content" served in name to bridge the gap between the old natural law and the new. But in truth beyond the name they have in common only the critical attitude and the insistence upon ideals which must characterize all philosophical jurisprudence.

It is interesting to note that the paper which may be regarded as marking the turning point in France did not come from an exponent of the philosophy of law. At the very end of the nineteenth century Boistel proceeded by deducing a whole system from an individualist principle of respect for personality and thus gave us simply a modernized metaphysical jurisprudence.[76] Stammler's ideas were taken up instead by an avowed adherent of the historical method [77] who at the same time was a leader in the field of comparative law.[78] Thus the factors in the revival in France appear to be three: the influence of Stammler's doctrine, the survival of philosophical jurisprudence both of the eighteenth-century and of the metaphysical type, and, not least, the verification of the idealistic interpretation by comparative law.

Two extracts will show the spirit of the new juristic thought in France. In the paper referred to Saleilles says:

"What does not change is the fact that there is a justice to be realized here below, the sentiment that we owe to all respect for their right, according to the measure of social justice and social order. But what shall be this measure, what shall be this justice, what shall be this social order? No one can say *a priori*. All these questions depend upon certain social facts with which the law comes in contact. These facts change,

[75] L'école historique et droit naturel d'après quelques ouvrages recents, Revue trimestrielle de droit civil, I, 80 (1902).

[76] Cours de philosophie du droit (1899).

[77] See *ante*, note 53.

[78] See a brief notice of Professor Saleilles and of his writings upon comparative law in my introduction to the English version of his Individualisation of Punishment.

evolve, and are transformed. But that depends also upon the conceptions one frames as to justice, as to authority and liberty, as to the right of the community and the rights of individuals, as to the proportion to be established in the incessant strife between these opposing forces; and this proportion varies and alternates." [79]

Charmont says:

"The idea of natural law, then, is conceived differently than it was formerly. It rests upon a different basis. At the same time it undergoes certain transformations. It is reconciled with the idea of evolution and with the idea of utility. It loses its absolute and immovable character. It has only a variable content. It takes account of the interdependence of the individual and of the whole. It tends also to reconcile the individual conscience and the law instead of putting them in opposition. In so transforming, juridical idealism is not weakened. On the contrary it is strengthened and broadened." [80]

Perhaps Demogue states it as well as it can be stated in saying that the new juridical idealism seeks "the ideal of an epoch" instead of endeavoring to realize an absolute ideal.[81] This means that the historical school and the philosophical school have come together in France, as the historical school and the analytical school came together in England. The historical jurists overthrew the old edifice of a law of nature and showed the futility of attempts to deduce a universal model code from abstract principles. But their attempt to find all the principles of law for the present and the future in the past proved futile also. Each has had to concede something. The philosophical jurist has been driven to concede the relativity of juristic ideals; the historical jurist finds himself driven to concede that ideals of right and justice have always been the motive force in periods of development and are needed to preserve life in the law. He is forced to admit that the past does not furnish all the materials for a healthy criticism. Thus we get a school of jurists who preserve and apply the historical method and at the same time preserve and apply the philosophical method; using the one to explain and the other to criticize the materials of existing law. History enables us to understand what we have and to perceive what we may hope to do with it. Philosophy enables

[79] L'école historique et droit naturel, Revue trimestrielle de droit civil, I, 80, 98.
[80] La renaissance du droit naturel, 217–218.
[81] Les notions fondamentales du droit privé, 22.

us to understand the measure by which it should be judged and the extent to which our juridical material conforms thereto.

The mechanical ideas of the positivists and of the older sociologists have likewise been given over. In the end they were leading to the same condition of juristic stagnation to which the historical school had led us. As Demogue puts it:

"In spite of the historical school, in spite of the importance of the sociological school which in its turn believed it could limit everything to study of the laws of evolution, we believe in the necessity of an ideal; for there is in human activity a certain element of the conscious, of the willed, which must be directed. To deny this is to put the laws of the physical world in the same rank with the principles of human action and to reduce the law to a descriptive study. It is also to refuse to guide the law-maker." [82]

It is not an accident that something very like a resurrection of natural law is going on the world over in the wake of the psychological movement in sociology.[83]

9. The Economic Interpretation.[84]

The relation of law to political science and economics is such that it was to be expected that the Marxian economic interpretation of history would be taken up in jurisprudence. This did happen. But it was long in coming and the progress of the idea in jurisprudence has been slight. Yet no account of contemporary juristic thought would be complete without some statement of the doctrine and of its applications to jurisprudence.

Seven ways of interpreting history have been recognized.[85] The

[82] *Ibid.* Sociologists today make the same criticism of the older sociological methods. Small, General Sociology, 636-639.

[83] See the use of Ahrens and Röder by Adler in his paper upon Persönlichkeitsrechte in Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches, 165, 175 *et seq.*; the "strengthening of the philosophical portion" in recent German texts, *e. g.* Gareis, Science of Law (Kocourek's transl.), xx; and Bigelow's attempt to found a sociological natural law, Centralization and Law, Lectures III and IV.

[84] Berolzheimer, System der Rechts und Wirthschaftsphilosophie, II, § 38, i; Stammler, Wirthschaft und Recht, 22–80; Menger, Neue Staatslehre, 2 ed., 16–27; Gumplowicz, Geschichte der Staatstheorien, 371 *et seq.*; Berolzheimer, Rechtsphilosophische Studien, 81 *et seq.*; Croce, Riduzione della filosofia del diritto alla filosofia dell' economia.

[85] In my account of this I have relied upon Seligman, The Economic Interpretation

idealistic interpretation,[86] which reached its highest development with Hegel, sought to interpret all historical growth in terms of thought and feeling. The religious interpretation found the clue to human progress and the determining influence in human development in religion. The political interpretation, a method beginning with Aristotle which has governed our political thought and has been the favorite interpretation in England and in America, found the clue to progress in a gradual but definite movement from absolutism to freedom in political institutions. The physical interpretation,[87] which begins in Vico and Montesquieu, and was worked out more fully by Buckle and perhaps more sanely by Ratzel, found the controlling factors in physical environment and looked to external physical causes, to climate, food, and soil, to explain social development. The ethnological interpretation is not easy to distinguish from the physical interpretation, but it differs in throwing the main stress upon the character and genius of races and the effects of race influence upon society. On the whole, it is ultimately a biological interpretation.[88] The culture interpretation finds the mainspring of human progress in the development of human culture, in the endeavor for increased culture.[89] Finally, the economic interpretation, of which Marx was the original exponent, proceeds upon the theory that "economic institutions are historical categories, and that history itself must be interpreted in the light of economic development." [90]

In like manner and, indeed, growing out of the foregoing modes of approaching history in general, there are at least six ways of interpreting jurisprudence and legal history, and the several schools

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of History, 2 ed.; Barth, Die Philosophie der Geschichte als Soziologie, 200–346; Small, General Sociology, 44–62.

[86] Barth calls it "ideological." Die Philosophie der Geschichte als Soziologie, 267. The individualistic interpretation, which Barth discusses, a view that the actions of great individuals are the only proper content of history, has no importance for jurisprudence.

[87] I use Professor Seligman's terminology here. Barth speaks of an anthropogeographical interpretation. Die Philosophie der Geschichte als Soziologie, 224.

[88] I take it Professor Seligman would include both this and the following among the applications of the economic interpretation. Economic Interpretation of History, 2 ed., 70 *et seq.* Classification is not of great importance here, but the distinctions recognized by Barth tally so well with marked and significant differences in juristic method that I have preferred to follow him at this point.

[89] As to the meaning of "culture" here, see *ante*, note 67.

[90] Seligman, Economic Interpretation of History, 2 ed., 35.

of jurists may be differentiated easily enough according to the interpretation for which they stand. The idealistic view of jurisprudence traces the development of the idea of justice as an ethical and moral phenomenon and its manifestations in the rules and principles applied in judicial decision, legislation, and doctrinal speculation. It seeks, therefore, the metaphysical or philosophical basis of justice and right as ideas. Upon the one idea, it seeks to construct legal history, upon the other, jurisprudence. This was the standpoint of the metaphysical jurists of the nineteenth century and of the historical jurists who accepted their metaphysic.[91] The religious interpretation of jurisprudence has found the key to juridical progress and to legal institutions in the progress of religious thought and in religious institutions. Something of the sort was attempted by Stahl [92] on a large scale, and others have tried to write particular chapters of legal history from this standpoint, — usually with very little result.[93] The political interpretation is the one with which we are all familiar. It assumes that a movement from subjection to freedom, from status to contract, is the key to legal as well as to social development. Thus it is a phase of the idealistic interpretation, seeing in law and in legal history a manifestation and development of the idea of liberty. Accordingly it finds the

[91] "The complete science of jurisprudence consists, therefore, in the rational comprehension of the whole of the conception of right as developed in time. In other words, the whole of jurisprudence is embraced in the universal history of Right. This universal history gives a representation of the perpetual connection of the formation, growth, and living principle of a people, and shows, in fact, how the realities of Right have been organically developed in the course of time in the progress of the world's history." Friedländer, Juristische Encyklopädie, 65 (1847), translated by Hastie, Outlines of Jurisprudence, 153.

[92] "The apprehension of things in their grand total coherence, according to their highest cause and last purpose we call world-view. Every philosophical system is such a world-view. Every religion includes such a world-view, none the less if with less thorough development. This is true also of the Christian religion. Now it is the latter which we take as the foundation of the theory of law and of the State." Stahl, Philosophie des Rechts, II, § 5 (1829).

[93] *E. g.* Troplong, De l'influence du christianisme sur le droit civil des Romains (1843); Maass, Der Einfluss der Christenthum auf das Recht (1886).

Yet such cases as the Stoic influence upon the classical period of Roman law and Puritan influence upon the common law must warn us that this interpretation is not to be despised. See my address, "Puritanism and the Common Law," Proc. Kansas State Bar Assn., 1910, 45. To those who accept the idealistic interpretation in whole or in part, religion must be an important factor. Those who follow the culture interpretation lay stress upon religion as one of the elements of culture. Kohler, Lehrbuch der Rechtsphilosophie, 27, 152, 172.

end of all law in liberty and conceives of jurisprudence as the science of civil liberty. As Lorimer puts it,

"the proximate object of jurisprudence, the object which it seeks as a separate science, is liberty."[94]

The ethnological interpretation has been expounded by Post, and was in great favor with sociologists during the reign of the so-called biological sociology. It looks to the ethnological environment of laws and finds in the characteristics of the races of man among whom laws exist the determining factors in juridical progress and in legal institutions.[95] It has close relation to the physical interpretation of Montesquieu, the economic interpretation and the culture interpretation, and used moderately, as Post uses it, is a needful corrective of other interpretations. He has not claimed for it that it was all-sufficient. As used by Post, the procedure in such an interpretation is purely empirical. But there have been those who have turned this into an idealistic method, postulating a certain type of legal genius for each people and then expounding their legal institutions as manifestations thereof.[96] The culture interpretation of the Neo-Hegelians has been considered in another connection. Only the idealistic and the political interpretations have had followers in America, and the latter has prevailed almost entirely.[97]

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[94] Institutes of Law, 2 ed., 353 (1880). Lorimer was one of the leaders of the metaphysical school of the nineteenth century. But historical jurists took the same view: "Freedom is the foundation of right, which is the essential principle of all law." "It is in freedom that the germ of all right and law lies." Puchta, Cursus der Institutionen, I, § 2 (1841), translated by Hastie, Outlines of Jurisprudence, 5, 6. Sir Henry Maine's famous generalization, Ancient Law, ch. 5 (1861), is an interpretation of legal history in this same way.

Under the influence of this political interpretation, it is a commonplace method to expound the "external history" of a legal system by way of introduction thereto. See, for example, Taylor, Science of Jurisprudence, chs. 3 and 4. Correspondingly, those who adopt the older idealistic interpretation preface a history of law with a discussion of the idea of right and justice and its development. See the remarks upon this practice in Pollock & Maitland, History of English Law, 1 ed., xiii.

[95] "Ethnological jurisprudence . . . is the investigation of the ethnical or social causes of the social manifestations of right (law)." Ethnologische Jurisprudenz, I, § 2 (1894).

[96] Carle, La vita del diritto, Bk. V (1880). Many attempts have been made to deal with the history of Roman law, particularly its beginnings, in this way. See Voigt, Römische Rechtsgeschichte, I, § 2 (1892).

[97] Two recent attempts at an idealistic interpretation are Kinkead, Jurisprudence, Law and Ethics (1905) and Pattee, The Essential Nature of Law (1909).

The economic interpretation has been expounded and applied to Anglo-American legal history by Brooks Adams.[98] His interpretation regards law as a manifestation of the will of the dominant social class, determined by economic motives. He asserts that the idea of justice has had nothing to do with the actual course of doctrinal development and legal evolution.[99] He maintains that "the rules of the law," to use his own words, "are established by the self-interest of the dominant class so far as it can impose its will upon those who are weaker." [100] The influence of propinquity has evidently given to this doctrine the imperative turn which suggests so strongly the analytical view. Austin might well say something like this, substituting the ideas of utility held by the dominant class for the self-interest of that class. Elsewhere, the imperative feature has been omitted; but with that exception the doctrine has been stated in the same way. Thus Croce says:

"The true history of the law of a people — of the law really enforced and not merely that formulated in the codes, which is often a dead letter — cannot be other than one with the social and political history of that people, which means that all juridical history is economic, a history of wants and of labor." [101]

So far as any of the foregoing interpretations is insisted upon as the *unum necessarium* in jurisprudence, one must feel with Professor Small that they are simply "snap-judgments about social laws." [102] This is true especially of the extreme economic interpretation in its imperative aspect. One has only to call to mind some of the many cases in which judicial and juristic idealism has produced and enforced ultra-ethical rules of conduct in advance of

[98] Centralization and Law, Lectures 1 and 2 (1906); The Modern Conception of Animus, 19 Green Bag 12 (1907).

[99] "You see that, in the abstract, right and justice as something beyond social convenience or, if you please, class advantage, are figments of the imagination. What you have, as a scientific fact, is an automatic conflict of forces reaching, along the paths of least resistance, a result favorable to the dominant energy." Centralization and Law, 35.

[100] *Id.* 45.

[101] Riduzione della filosofia del diritto alla filosofia dell' economia, 46 (1907). Compare Leist, Privatrecht und Kapitalismus im 19 Jahrhundert (1911), and Bohlen, The Rule in Rylands *v.* Fletcher, 59 Univ. of Pa. L. Rev. 298, 319. In these studies of the relation of economics to particular doctrines we are upon firmer ground.

[102] General Sociology, 61.

the ideas of the dominant or any other class of the lay community,[103] or in which a pure juristic tradition logically developed by lawyers drawn from the dominant social class has withstood the interest of that class,[104] to perceive how narrow it is as a foundation for jurisprudence or as a philosophy of legal history. However wrongly entertained and believed in, the ideal of an absolute, eternal justice, to which jurists and judges have sought to make the rules enforced in the tribunals approximate so far as possible, has been a controlling force in the classical periods, the periods of growth, of both of the great legal systems of the world. It was the motive power in the period of the *ius naturale* in Roman law and in the period of the school of natural law on the Continent in the seventeenth and eighteenth centuries. It was equally the motive power in the period of the rise of the court of chancery and the development of equity in England and in the period of American common law, the period of making over the traditional principles of English case law to meet our requirements, in the United States. The doctrine, which purports to rest on history, is refuted by history. And, in truth, it is more an interpretation of legislation than of law; and of that least important part of legislation which arbitrarily seeks new paths. For this reason it interprets the least enduring part of legal development. We must not forget that the administration of justice aims consciously at more than the imperative economic interpretation would hear of; and so we must take account of the extent to which the human will is moved by tradition, sentiment, the exigencies of a received system and many like factors, even against self-interest.

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[103] *E. g.* the English doctrines as to trustees that led to the Judicial Trustees Act. "Sometimes I have wandered into a court of equity which knows not juries. One finds oneself in a rarified atmosphere of morality and respectability in which life is hardly possible. Look at the equitable doctrines of constructive notice and constructive fraud. Look at the impossible standard of duty laid down for trustees. Such a system of law could never have arisen with juries." Chalmers, Trial by Jury in Civil Cases, 7 L. Quart. Rev. 15, 19. In the same place, Judge Chalmers speaks of the "sublimated morality" of courts of equity as contrasted with the "sub-lunary" morality of juries. But surely, in England at least, juries have represented the "dominant social energy," since we are taught that while the barbarians administer, the philistines govern, and the British juror is drawn from the middle class.

[104] Certainly the man of business has been representative of the dominant class of our industrial communities in the immediate past. But his needs and desires have made scant impression upon the traditions of our law as to corporations. See Machen, Do the Incorporation Laws Allow Sufficient Freedom to Commercial Enterprise, Transactions, Maryland State Bar Assn., 1909, 78.

Even more must we do this when the administration of justice is in the hands of a profession with a long tradition of principles, an ideal of justice and a systematic science. In other words, we must regard "the spiritual initiative, which is superior to mechanical causation." [105] The insistence of the Neo-Kantians and of the new school of jurists in France upon the psychological side is parallel with the rise of social psychology among the sociologists. What is valid in the economic interpretation is better expressed by Kohler.

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[To be continued.]

[105] Small, General Sociology, 639.